

Cherokee History, Law & Culture

North Carolina Conference of District Court Judges
Cherokee, North Carolina
October 20, 2021

Welcome To Indian Country!!


Judge Bradley B. Letts
Senior Resident Superior Court Judge District 30B

1

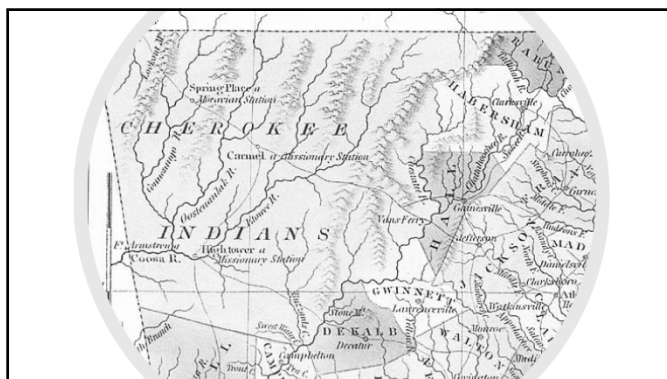
Historical Background

The Cherokee lived in the southern Appalachian area in lands which subsequently became 9 States including NC, Georgia SC and Tennessee.

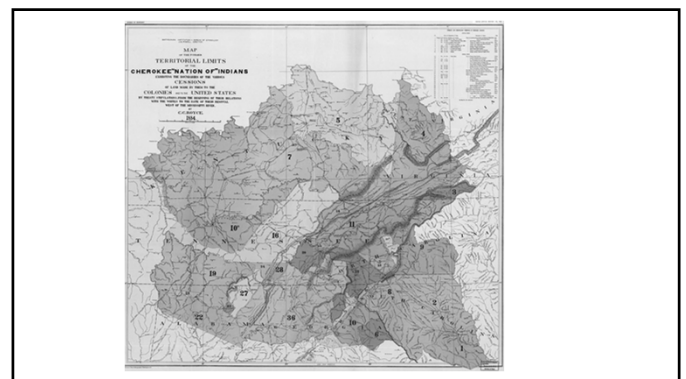
Cherokee Lands 1830
Map by Anthony Finley Co.



2



3



4

Jackson County History

- Jackson County was established in 1851 and formed from Haywood and Macon counties
- Named after President Andrew Jackson
(Seventh President of the US 1829-1837)
- 2010 census 40,271
- Portion of Cherokee Trust Land is in Jackson County
- 10% Native American population

5

Swain County History

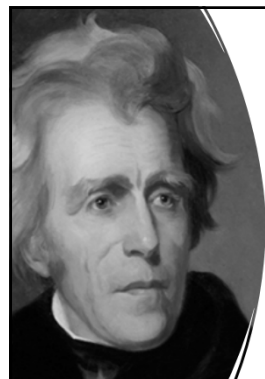
- Formed from parts of Jackson and Macon County in 1871
- With passage of the 1868 NC Constitution Cherokees voted
- 2010 Census 13,981
- 29% Native American population
- Split Jackson County to dilute Indian vote
- "The balance of power will probably lay in the hands of the Indian vote."

George Smathers to Commissioner of Indian Affairs Thomas J. Morgan, Sept. 8, 1892.

6

Irony in Naming Jackson County

- Congress passed, and President Jackson signed, the Indian Removal Act May 26, 1830
- His policies resulted in the Trail of Tears where the Cherokee and other Tribes were forcibly removed in 1838
- 45,000 Indians relocated to the West
- Marshall trilogy cases:
Johnson v. M'Intosh, 21 U.S. 543 (1823)
Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
Worcester v. Georgia, 31 U.S. 515 (1832)

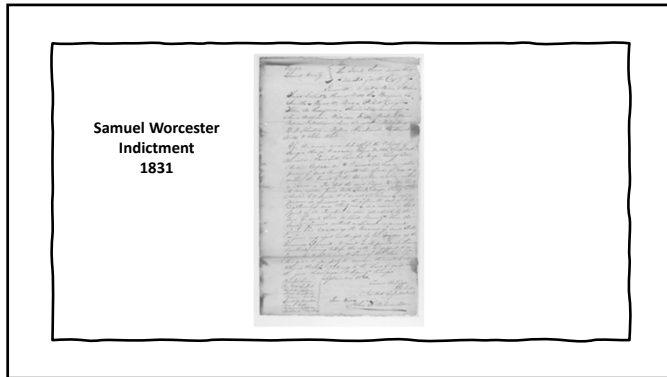


7

200+ Years of Federal Indian Law (In Two Slides)

- In Cherokee Nation v. Georgia Chief Justice Marshall wrote in 1831 that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."
- Indian Tribes are "domestic dependent nations."

8



9

200+ Years of Federal Indian Law

In Worcester v. Georgia, Chief Justice Marshall wrote:



- “Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial. . . .”
- “The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”

10

Trail of Tears 1838-1839

Fort Marr, Old Fort, TN

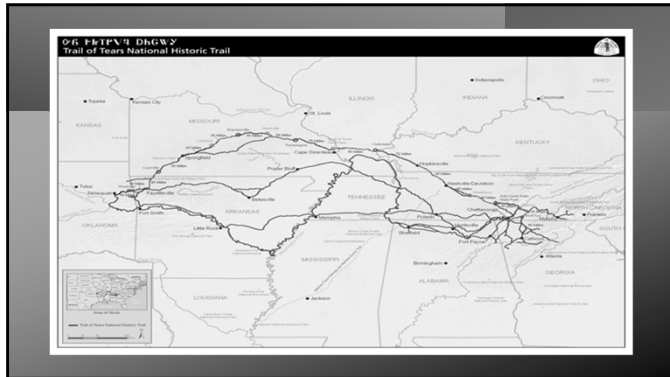
Stockade Design



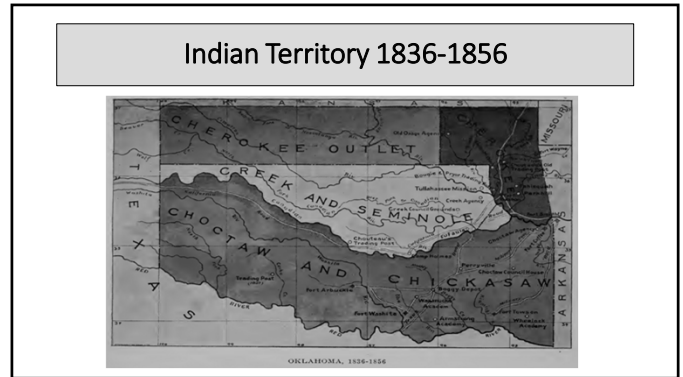
11

Cherokee Stockades in Western NC

12



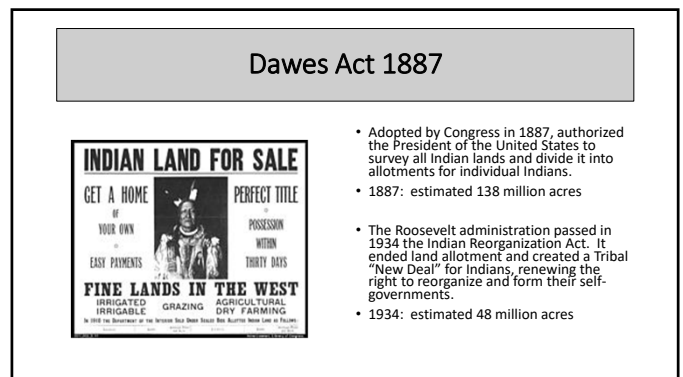
13



14



15



16

President Coolidge After Signing the Indian
Citizenship Act (Snyder Act) June 2, 1924



Indians Became Citizens of the United States on June 2, 1924

17



18

North Carolina General Assembly
Act to Survey and Sell Cherokee Lands
January 20, 1837

CHAP. IX.

An Act prescribing the mode of surveying and selling the lands of this State, lately acquired by treaty with the Cherokee Indians.

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That as soon as may be convenient after the next

COURTESY OF LANDIS.

[illegible]

North Carolina General Assembly
Act to Prevent Frauds on Cherokees
January 21, 1837

CHAP. VIII.

An Act to prevent frauds on Cherokee Indians, residing in this State.

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That all contracts and agreements of every description, made after the eighteenth day of May one thousand eight hundred and thirty eight, with any Cherokee Indian, or any person of Cherokee Indian blood, within the second degree, for an amount equal to ten dollars or more, shall be null and void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorised, in the presence of two credible witnesses, who shall also subscribe the name.


[Ratified 21st January, 1837.]

- Contracts with a Cherokee
- Value of \$10 or more
- Void, unless:
 - In writing
 - Signed by the Cherokee
 - In presence of 2 credible witnesses
 - Attested by 2 credible witnesses

19

20

William Holland Thomas
1805-1893

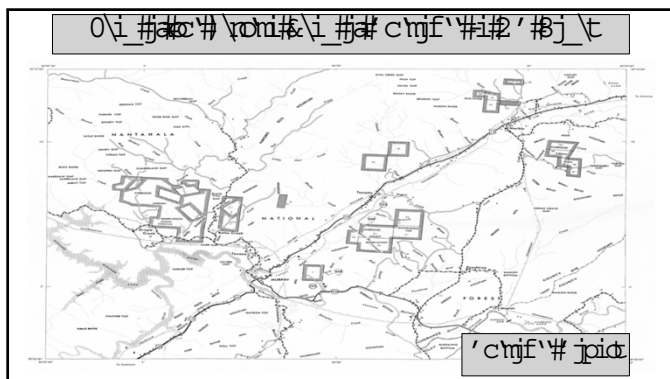


21

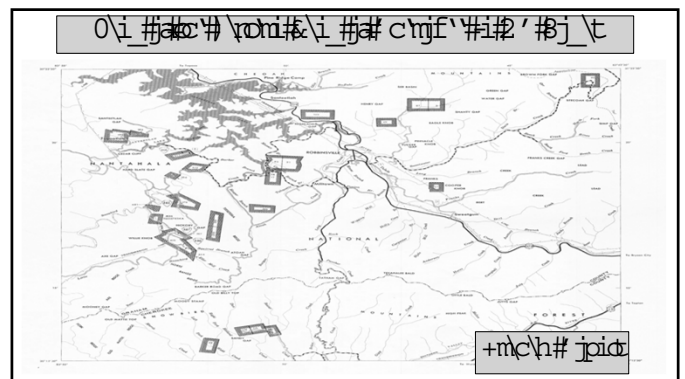
Establishment
of
Eastern Band
of Cherokee
Indians
North Carolina

- EBCI were recognized by the United States as a distinct Federally recognized Indian Tribe on June 4, 1924
- You are on the Qualla Boundary which are Indian Lands titled in the United States & EBCI for the use and benefit of the EBCI
- 56,000 acres

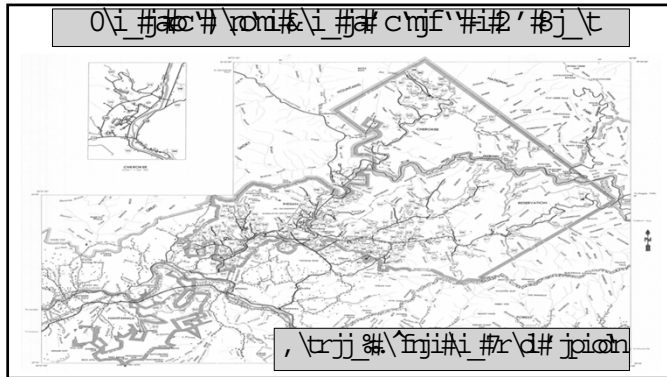
22



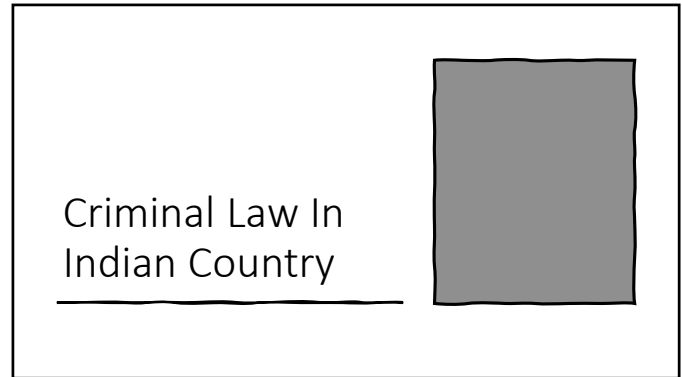
23



24



25



26

So, Under the Law, Who Is An Indian?

- Use the Rogers Test!

- ✓ In 1845 William Rogers, a white man, killed Jacob Nicholson, a white man, on Cherokee land (now Oklahoma). Indicted Arkansas Federal Court for murder.
- ✓ Rogers moved voluntarily to Cherokee country in 1836 without intending to return to the US, was adopted by the tribe, and became a Cherokee citizen. He married a Cherokee woman in 1836, they remained married until she died in 1843, and they had Cherokee children who lived in the Cherokee Nation.
- ✓ Similarly, Nicholson (the victim) assimilated into the Cherokee Nation.
- ✓ Rogers argued the US had no jurisdiction over him because it was a crime committed by an Indian against an Indian in Indian Country.

27

DENIED

Chief Justice Taney

- U.S. v. Rogers, 45 U.S. 567 (1846) established the 2-part analysis used to determine whether an individual is defined as an "Indian" which asks whether the defendant:

- (1) has some quantum of Indian blood
- and
- (2) is recognized as an Indian by a tribe or the federal government or both.

28

Procedural Posture in *Rogers*

- At the time the case was argued Rogers had been dead 10 months
- His death was **not** included in the certified record sent from Arkansas to the Supreme Court
- The Attorney General did not make this fact know to the Supreme Court in arguments
- No one appeared for Rogers at the Supreme Court
- “[F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their vices.” *Rogers* at 572.

29

FLAVOR OF THE TIMES



Lieutenant Colonel Richard Mason,
Commander Fort Gibson, Indian Territory

- “You will soon see a plenty of charges with no other witnesses to support them but Indians.”
- “Soured as ignorant Indians generally are against the military, (the Cherokee and Seminoles who have been removed to this country at the point of bayonet, in particular,) if you establish that they are legal witnesses—who of us are safe?”

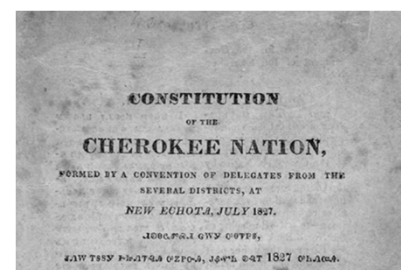
30

Cherokee Jury Instruction 1840

“In carefully sifting this evidence and in concluding upon the case, I would farther [sic] enjoin upon you, jurors, . . . to remember that the only point which you have a right to consider in this matter is the charge against Archilla Smith for murdering John Macintosh. Whatever you may know or have heard about him or his actions or his character before, must be dismissed entirely from your minds. You break your oath if you allow any impression whatever to mingle with the proofs for or against this single charge. You break your oath equally if you permit the political difficulties under which the nation laboured not long since, and to which the counsel on both sides have made some allusion, in any way to influence your judgment. You have no right to believe evil of Archilla Smith, because you may object to his course in politics;—you have no right to shrink from condemning him, if guilty, from the fear that condemnation may be ascribed to political prejudices. You must keep yourselves equally free from the desire to be vindictive or to show mercy;—the one would make you the criminal instead of him whom you would condemn;—the other is the prerogative of a department of our government, to which we have ourselves prescribed regulations for its exercise. Your duty bids you examine testimony; and to give your honest verdict fearlessly, whenever you are convinced; and may you be guided to such judgment as your conscience may never hereafter disapprove.”

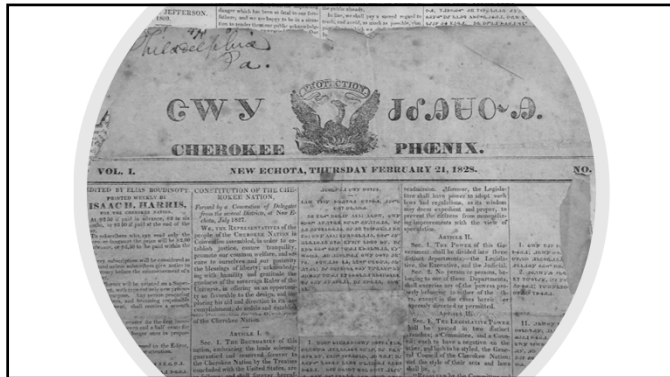
Jesse Bushyhead, Chief Justice of the Cherokee Supreme Court 1840

31



Cherokee
Constitution
of
1827

32



33



The Honorable Bradley Letts, *The Cherokee Tribal Court: Its Origins and Its Place in the American Judicial System*, 43 CAMPBELL L. REV. 47 (2021).

<https://scholarship.law.campbell.edu/clr/vol43/iss1/3>

- The Honorable Beth S. Dixon, *For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology*, 43 CAMPBELL L. REV. 21 (2021).
<https://scholarship.law.campbell.edu/cclr/vol43/iss1/2/>
- The Honorable J. Hoyte Stultz III, *Fences and Gates: A Survey of Collaborative Aspects of District Court Practice in Light of Self-Represented Litigants, Addiction, and the Mandate to Formulate Plans*, 43 CAMPBELL L. REV. 77 (2021).
<https://scholarship.law.campbell.edu/cclr/vol43/iss1/4/>
- Judge J. Matthew Martin, *The Cherokee Supreme Court: 1823-1835*

34



- Where defendant and victim are non-Indian, state court jurisdiction.
U.S. v. McBratney, 104 U.S. 621 (1881)
- Where the defendant is a non-Indian and the victim an Indian federal court jurisdiction.
Donnelly v. U.S., 228 U.S. 243 (1913)
- A state has jurisdiction over an Indian when he is outside of "Indian country".
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)
- Where the defendant is an Indian and the victim a non-Indian federal court jurisdiction.
U.S. v. John, 587 F.2d 683, 687 (5th Cir. 1979)

35

CRIMINAL JURISDICTIONAL CHART

When the Crime Committed is a “Major” Crime

[illegible]

36

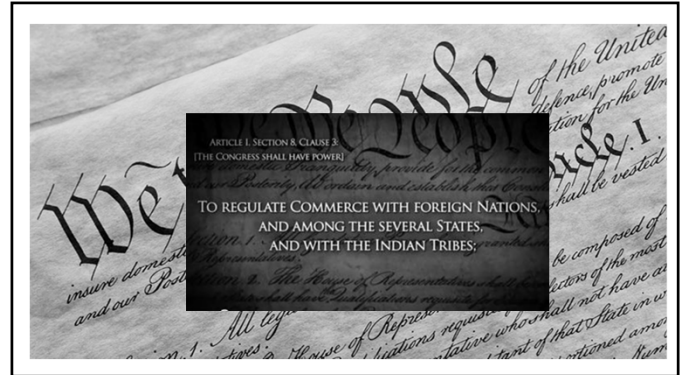
EBCI Rogers Test

- Do you have any quantum of Indian Blood?
- Are you an enrolled member or are you eligible to be an enrolled member of any federally recognized Indian Tribe?

State v. Nobles, 838 S.E.2d 373, cert. denied, 141 S.Ct. 365 (2020).

EBCI Rogers Test	
NAME	
ADDRESS	
CITY	
STATE	
ZIP	
DATE OF BIRTH	
SEX	
RACE	
EDUCATION	
OCCUPATION	
MARRITAL STATUS	
CHILDREN	
PARENTS	
GRANDPARENTS	
OTHER RELATIVES	
OTHER INFORMATION	
SIGNATURE	
DATE	

37



38

Indian Child Welfare Act

“Children are the only real means for the transmission of tribal heritage.”

Mississippi Choctaw v. Holyfield, 490 U.S. 30, 34 (1989).

39

40

Civil Law In Indian Country

41

Civil Jurisdiction

Williams v. Lee, 358 U.S. 217 (1959)

- Jurisdiction of state courts does not extend to Indian reservations absent an express grant of authority by Congress.

42